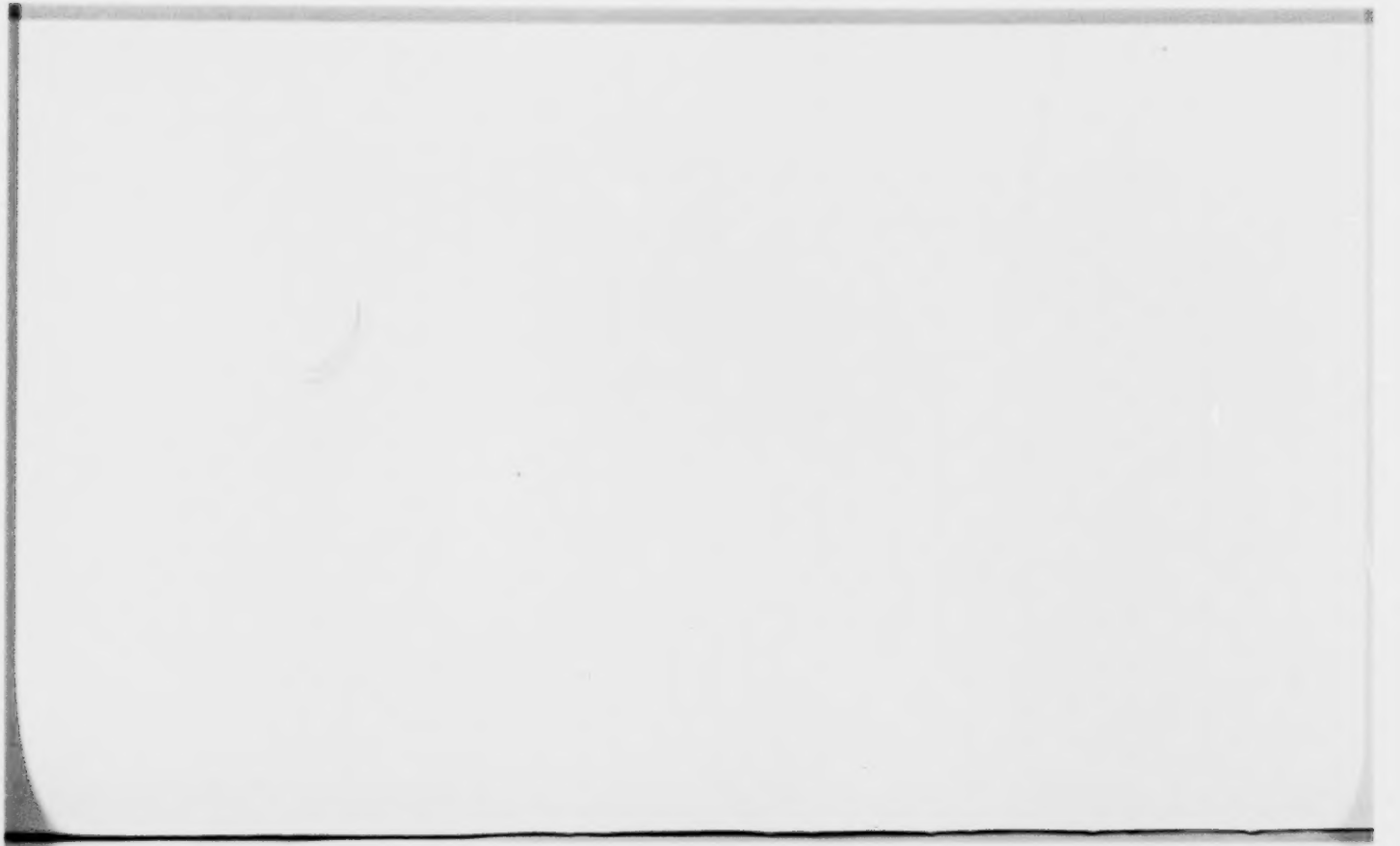

# In the Supreme Court of the United States

OCTOBER TERM, 1944

**WILLIAM LEE SMITH, *Petitioner,***

***vs.***

**UNITED STATES OF AMERICA.**

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Opinion of Court Below.

The opinion has not yet been reported officially. The judgment complained of appears on page 9 of the transcript. The opinion rendered by the Tenth Circuit Court of Appeals appears on page 50 of the transcript. The judgment of said Circuit Court of Appeals appears on page 55 of the transcript. Application for rehearing was denied without opinion (Tr. 65*). Order denying motion for stay of mandate, page 65 of the transcript.

*All references are to the Transcript of Records, prepared under the direction of the Tenth Circuit Court of Appeals.

## II.

### Jurisdiction.

1.

The statutory provision is Judicial Code, 240 (Title 28 USC Section 347 (a)) as amended.

2.

The date of the judgment is October 26, 1944, on which date the Tenth Circuit Court of Appeals affirmed the judgmen of the District Court (Tr. 55). Petition for rehearing was duly filed and denied on November 27, 1944 (Tr. 65). Order denying motion to stay mandate, December 2, 1944 (Tr. 65).

3.

That the nature of the cause and rulings below brings the case within the jurisdictional provisions of Section 240 above appears from the following: *Martel* v. *United States*, 227 U. S. 427, 57 L. ed. 583:

> "It is elementary that an indictment, in order to be good under the Federal Constitution and laws, shall advise the accused of the nature and cause of the accusation against him, in order that he may meet the accusation and prepare for his trial, and that after judgment he may be able to plead the record and judgment in bar of further prosecution for the same offense."

Demurrer:

> "The said indictment fails to allege facts sufficient to constitute a crime or offense against the United States of America.

"The said indictment discloses and shows upon its face that no facts are alleged or set forth to constitute a crime or offense under Section 80 of Title 18 of United States Code Annotated.

"That said indictment fails to state facts sufficient to acquaint or to give defendants or either of them notice of the crime with which they are sought to be charged and tried." (Tr. 7)

That the verdict is not supported by the evidence.

Judge MURRAH says: "That the indictment charges an offense under Criminal Code 47 (Section 100, Title 18 USCA)." (Tr. 50)

"Section 100. 'Embezzle, steal or purloin * * * any property of the United States.'"

The following cases, among others, sustain the jurisdiction: *Cook* v. *United States*, 138 U. S. 157, 181; *United States* v. *Hess*, 124 U. S. 483, 31 L. ed. 516. These cases, and many others, establish the fact that the failure to accurately and clearly allege every ingredient of which the offense is composed, in the indictment, is a violation of the Constitution. *Beidler* v. *Tax Commission*, 282 U. S. 1, 8; *Fiske* v. *Kansas*, 274 U. S. 480, 385-6; *Cresswell* v. *Knights of Pythias*, 225 U. S. 246, 261; *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 745, decide that, where a federal right has been asserted and denied, it is the province of this Court to ascertain whether the conclusion of the State Court (Circuit Court of Appeals) has adequate support in the evidence (parenthesis ours).

## STATEMENT *of* FACTS.

The petitioner, as defendant below, was indicted and convicted in the District Court, Eastern District of Oklahoma, on the 12th day of February, 1944 (Tr. 6), for alleged conspiracy to violate some section of Title 18, it not being clear whether the same is Section 80, 82, 83, 84, 85 or 86 of said Title.

The indictment is in three counts, and there was a verdict of guilty on all counts, February 22, 1944 (Tr. 7).

Count one charged defendant did, between the 1st day of November, 1943, and the 1st day of December, 1943, conspire, etc., with others to commit an offense against the United States of America, in violation of Section 80, Title 18, USCA (Tr. 1). The United States District Attorney stated that he was attempting to charge conspiracy to violate Section 88, Title 18 USCA (Tr. 51) and the stenographer "got it 80". What the indictment really attempts to charge is that they attempted to violate the laws of the United States, Section 87 of Title 18 USCA, and shall be punished as prescribed in Sections 80 and 82 to 86, inclusive, of said Title, and that petitioner, having been one of the conspirators, without the knowledge and consent of the United States, or any person having authority to give consent, to sell, convey and dispose of eggs, butter and cheese, and other groceries, property of the United States, and that the proceeds of said sale and purchase should be converted to the use and benefit of said conspirators (Tr. 1); and thereafter followed overt acts, 1, 2, 3, 4, 5, 6, 7 and 8. Count 2 charges that on the 5th day of November, 1943, the co-conspirator Croom, did, unlawfully, etc., sell and dispose of one case of butter, containing thirty-two pounds, to the petitioner, William Lee Smith,

for the sum of ten dollars ($10.00); that the said butter was the property of the United States, being used by the Military Service at Camp Gruber, Oklahoma. Count 3 charges that on the 18th day of November, 1943, said co-conspirator Croom did, in like manner sell to said petitioner, ten cases of eggs, twenty-four pounds of butter and forty-four pounds of cheese for the total sum of sixty-seven dollars and fifty cents.

On February 2nd, 1944, permission of court having been granted, defendant withdrew his plea of not guilty, for the purpose of filing demurrer to the indictment, which, after hearing, was overruled by the court and exceptions allowed (Tr. 7).

Thereafter, on the 21st day of February, 1944, said cause proceeded to trial before a jury, which trial was concluded on the following day, and the proceedings thereof are shown in the bill of exceptions (Tr. 14).

At the close of the Government's testimony, during the trial, the defendant demurred to the Government's evidence, and requested a directed virdict, which was overruled and denied, to which ruling of the court the defendant then and there excepted. And at the close of the testimony in the case the defendant again demurred to the evidence, and moved the court to direct a verdict of not guilty as to each and every count in the indictment, for the reason that the evidence was insufficient to sustain the charge contained in said indictment. The demurrer and motion for a directed verdict were both overruled by the court, to which ruling the defendant then and there excepted and still excepts.

Thereupon, after argument of counsel, the court in-

structed the jury as to the law of the case, and thereupon the cause was finally submitted to the jury, and the jury, after due deliberation returned a verdict of guilty as to all counts.

Thereupon the defendant was sentenced by the court to eighteen months imprisonment on Count I.

> Judgment and commitment: 1. "Conspiracy to embezzle and dispose of Government property, from November 1, 1943, to December 1, 1943, in Muskogee County, Okla." (Tr. 9)

Thereupon, defendant filed and presented to the court his motion for a new trial, calling attention to the various errors complained of, as disclosed by the record in this case (Tr. 13), which motion upon hearing was overruled by the court, to which defendant was allowed an exception.

Thereafter, in due course, the defendant filed his notice of appeal from the judgment and sentence of the trial court to the Tenth Circuit Court of Appeals, setting forth four separate and distinct grounds of appeal which constitute the errors relied upon in this case (Tr. 13).

Thereafter, a bill of exceptions was tendered by the defendant, setting out the evidence in narrative form, which was settled and allowed by the trial judge, and made a record in this cause (Tr. 14).

Praecipe for transcript of record was filed and an order entered directing the clerk to prepare record for appeal.

Thereupon, a transcript of record was duly prepared and printed by the clerk of the District Court, and upon the records and proceedings disclosed therein, this appeal was

presented to the Tenth Circuit Court of Appeals at Denver, Colorado.

The conviction was affirmed July 17, 1944; motion for rehearing overruled November 27, 1944; motion to stay mandate denied December 2nd, 1944; the application for a writ of certiorari is now before this Honorable Court for consideration.

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## STATEMENT *of* POINTS.

*1.* The court erred in overruling defendant's demurrer to the indictment rendered in said cause.

*2.* The court erred in overruling the demurrer of the defendant to the evidence of the Government, in support of the indictment, at the close of the Government's case, and in overruling and refusing to sustain the motion of the defendant at the close of the whole case, and direct a verdict in favor of the defendant.

*3.* The court erred in overruling and refusing to sustain defendant's motion for a new trial.

*4.* That the Tenth Circuit Court of Appeals erred in affirming the verdict of the jury and the judgment and commitment on the verdict of the District Court in refusing to allow a rehearing and in refusing to grant a motion for stay of mandate.

## BRIEF OF THE ARGUMENT AND AUTHORITIES.

### I.

**The court erred in overruling the demurrer.**

From a careful study of the indictment we are unable to determine exactly what this petitioner is being prosecuted for, and the further the case proceeds the more mystifying it becomes. The indictment charges a violation of Section 80, Title 18 USCA (Tr. 1). The prosecutor says the petitioner is being prosecuted under Section 88, of Title 18, which is the general conspiracy statute, and then says that the indictment seeks to charge conspiracy under Section 87, Title 18, which reads as follows:

> 87. (Criminal Code 36) "*Embezzling Arms and Stores.* Whoever shall steal, embezzle or knowingly apply to his own use, or unlawfully sell, convey or dispose of, any ordnance, arms, ammunition, clothing, substance, stores, money or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in Sections 80, and 82 to 86 of this Title. R. S. Sec. 5349; March 4, 1909, c, 321, Sec. 36, 35, Stat. 1096.)"

The District Judge thought petitioner was being prosecuted under Section 87, Title 18, as is evidenced by his judgment and commitment (Tr. 9), which is as follows:

> "1. Conspiracy to embezzle and dispose of Government property from November 1, 1943, to December 1, 1943, in Muskogee County, Oklahoma."

The Circuit Court of Appeals is of the opinion that this petitioner is being prosecuted under Section 100 of Title 18 USCA, which is Section 47 of the Criminal Code. If this indictment is so uncertain and indefinite as to the charge

intended as to cause such divergence of opinion among men so well versed in the law, the attorneys for the petitioner, the attorney for the United States, the District Judge of the United States and the Judges of the Circuit Court of Appeals of the United States, can we say that, "every ingredient of which the offense is composed is alleged with such accuracy and clarity" in the indictment as to enable a mere layman, a country merchant, to understand exactly just what offense he is being prosecuted for? We think not.

After the case was in course of trial the District Attorney decided that the indictment was properly laid under Section 87, and the U. S. District Judge thought the same.

Section 87, leaving out the words "steal, embezzle and knowingly apply to his own use," reads:

> "Whosoever shall, unlawfully * * * sell, convey, or dispose of any ordnance, arms, ammunition, subsistance, etc., or other property of the United States," etc.

The pertinent part of the indictment is:

> "that the said defendant Woodrow Wilson Croom, who was at that time a member of the armed forces of the United States of America, stationed at Camp Gruber, Oklahoma, having access to the stores, groceries and other property of the United States, etc., would unlawfully, and without the knowledge and consent of the United States, etc., *sell, convey,* and *dispose* of eggs, butter, cheese," etc.

The indictment further states that this petitioner conspired with Croom and others to commit the above acts. The indictment charges under Section 87, Title 18, that this petitioner, together with Croom and others, unknown to the grand jury, did conspire to *sell, convey* and *dispose* of eggs,

butter, cheese, etc. And nothing else. Conspiracy to *sell, convey* and *dispose* of eggs, butter and cheese is the only offense this petitioner is accurately and clearly charged with, and as stated by the Attorney General and Judge MURRAH of the Tenth Circuit Court of Appeals and by the Seventh Circuit Court in *Holmes* v. *United States*, 267 Fed. 529 (Tr. 51), this indictment under Sec. 87 would be void.

Judge MURRAH said:

> "The next and more serious contention is to the effect that the United States Attorney stated for the record that the indictment was intended to charge a conspiracy to violate Section 36 of the Criminal Code (Sec. 87, Title 18 USCA) which section is inoperative and void as a criminal statute because it does not prescribe the punishment for violation with sufficient definiteness and clarity, therefore the indictment does not charge an offense against the United States within the meaning of the general conspiracy statute. (Sec. 88, Title 18 USCA.)
>
> "When the conspiracy charged in the indictment is alleged to have been commenced (November 1, 1943) Section 36 of the Criminal Code (Sec. 87, Title 18 USCA) provided in substance that whosoever shall steal, embezzle or unlawfully sell, convey or dispose of property of the United States furnished or to be used for the military or naval service, shall be punished 'as prescribed in the preceding section'. This preceding section which is Section 35 of Criminal Code 35 Stat. 1095 (Sections 80, 82, 83, 84, 85, 86) of Title 18 USCA, as amended June 23, 1918, 40 Stat. 1015; June 18, 1934, 48 Stat. 996; and April 4, 1938, 52 Stat. 197, created three separate and distinct offenses and provided three separate and distinct punishments of different severity for the violation of each offense.

"A criminal statute must be definite and certain in respect to the punishment it intends to impose, *Holmes* v. *United States*, 267 Fed. 529; *Hans* v. *Jennings*, 166 N. E. 357; *Ex Parte Elsworth*, 133 P. 272; *People* v. *McNulty*, 26 P. 297, 29 P. 660. And a statute, which by reference to another, leaves the sentencing court in doubt as to the punishment it may impose for the described offense, is void and inoperative.

"For this reason Section 36 was declared to be void and inoperative in *Holmes* v. *United States* above, wherein it also specifically held that a conspiracy to violate this statute did not constitute an offense against the United States in violation of Section 88, Title 18 USCA. Moreover the invalidity of the statute has long since been recognized by the Attorney General of the United States, and at his suggestion (see U. S. Code Congressional Service 1943 No. 8 2.275) the Congress House Bill No. 1202, approved November 22, 1943, Pub. 188, 78th Congress, amended Section 36, by specifically designating which of the different punishments authorized by preceding Section 35 was applicable to violations covered by Sec. 36.

"Thus it is plain that if the indictment here depends upon Section 36 (87 Title 18 USCA) it fails to charge a conspiracy against the United States," etc.

Therefore, the only offense charged in the indictment, *being the offense of conspiring to sell, convey and dispose* of eggs, butter and cheese, being covered by no other section than Section 87, should have been disposed of by petitioner's demurrer to the indictment.

But, the Tenth Circuit Court of Appeals, by Judge MURRAH, says that: "Section 37 of the Criminal Code (Sec. 88, Title 18 USCA) makes it unlawful to conspire to 'commit any offense against the United States,'" and that Sec-

tion 47 Criminal Code (Sec. 100, Title 18 USCA) which provides that whoever shall *embezzle, steal* or *purloin* any property belonging to the United States shall be punished as therein provided.

We raise no objection to the validity of this statute (47 Criminal Code). This statute creates two offenses, the punishment for each being the same. One offense is to embezzle government property and the other is to steal government property.

(a)

Does the indictment charge conspiracy to embezzle government property? No. The indictment is insufficient to charge embezzlement for the reason that it does not show that the property was in the legal care, custody and control of the defendant, Croom. The mere allegation that he was a soldier and had access to the supplies does not show that the defendant, Croom, had the legal care, custody and control of the property claimed to have been embezzled. In *Moore* v. *United States,* 160 U. S. 268, 40 L. ed. 422, this Court said:

> "Defendant was indicted under the first Section of the Act of March 3, 1875, 'to punish certain larcenies and the receivers of stolen goods,' which enacts that any person who shall embezzle, steal or purloin any money, property, etc., property of the United States, shall be guilty of a felony, etc.
>
> "The principle assignment of error is to the action of the court in overruling a demurrer to the fourth count of the indictment, which charges, in the words of the statute, that 'the said George S. Moore, being then and there an assistant clerk, or an employee or connected with the business or operations of the United

States Post Office in the City of Mobile, in the State of Alabama, did embezzle the sum of.....money of the United States, of the value of....., the said money being the personal property of the United States.'

"Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted or into whose hands it has lawfully come.

"If, then, the indictment in this case had charged that defendant, being then and there assistant, clerk, or employee or connected with the business or operations of the United States Post Office, in the City of Mobile, Alabama, embezzled the sum stated, and had further alleged that such sum came into his hands in that capacity we should have held the indictment sufficient. But if the words charging him of being in the employ of the government be stricken out, then there would be nothing left to show why the property embezzled could not be identified with particularity and the general rule above cited would apply. The indictment would then reduce itself to a simple allegation that the said George W. Moore at a certain time and place, did embezzle the sum of $1,652.29, money of the United States, which generality and description would be bad. As there was a demurrer to this count, which was overruled, we do not think the objection is covered by U. S. Rev. Stat., 1025, or cured by the verdict."

The petitioner should be apprised of the law under which he is being prosecuted. The charge must be made directly and not inferentially or by way of recitals. There is no conclusive or even rebuttable presumption that because Croom was a soldier, stationed at Camp Gruber and had access to the property of the United States, that he was the legal custodian thereof. That would be a violent presump-

tion indeed. There are thousands of soldiers at Camp Gruber, who have access to the property of the United States. The universal rule on this subject is that all material facts and circumstances embodied in the definition of the offense must be stated or the indictment is defective. *Moore* v. *United States (supra); United States* v. *Hess*, 124 U. S. 483, 31 L. ed. 516; *Lynch* v. *U. S.* (C.C.A. 10), 10 F. (2d) 947; *Fontanna* v. *U. S.* (C.C.A.), 262 Fed. 283.

(b)

The indictment is not sufficient to charge larceny (steal) under Section 100, Title 18 USCA. In *Fleck* v. *United States*, 265 Fed. 617, it is said:

> "'An indictment for larceny must state that the defendant feloneously "took, stole and carried away."' *Grey* v. *State*, 84 Ind. 223.
>
> "'In an indictment for larceny charging that the defendant "feloneously took and carried a bundle of lint cotton" omitting the word "away" is defective.' *Roundtree* v. *State*, 58 Ala. 381.
>
> "'An indictment against a thief and receiver of stolen property "feloneously did take, steal and carry" insufficient, because the word "away" was left out.' *Commonwealth* v. *Adams*, 73 Mass. 43."

II.

**The District Court had no jurisdiction to proceed further against this petitioner, when it was admitted that the indictment charged no offense under Section 80.**

Further we contend that the District Court had no jurisdiction to proceed further against this petitioner, when it was admitted that the indictment charged no offense

under Section 80; the fact that the trial court proceeded with the trial under the theory that this indictment was laid under Section 87 or 88 would be in effect permitting an amendment to the indictment which charged conspiracy to obtain money by the presentation of false claims Sec. 80, Title 18 USCA. This petitioner was informed by indictment that they, the grand jurors, believed that he had conspired to so obtain money by uttering false claims (Sec. 80). This petitioner could not be proceeded against in any other manner. In order for the court to legally try this petitioner for violation of Sections 87 or 88 this indictment would have had to be submitted to the grand jury and the amendment made at their hands. This was not done.

"One charged of a crime is entitled to be informed by indictment or information of the nature of the defense against which he is to defend."

—12 Okl. Cr. 260, 157 Pac. 272.

"Stipulation could not add particulars to indictment since nothing could be added to indictment without the concurrence of the grand jury."

—*U. S.* v. *Norris*, 281 U. S. 619, 74 L. ed.

*U. S.* v. *Kuner*, 252 Fed. 894.

"Trial court in striking certain words from the count, to which defendant made no objection, constituted error fatal to the conviction in that court."

—*Dodge* v. *U. S.*, 258 Fed. 300.

"Ingredients not set forth in the information or criminal accusations cannot be incorporated into the charge against him after he has been served with process."

—*U. S.* v. *Mann*, 95 U. S. 580, 24 L. ed. 531.

"An amendment of the indictment at the trial deprives the court of the power to proceed on the count amended."

—*U. S.* v. *Holtz*, 28 Fed. 81.

"Where a criminal information is required it cannot be amended at the trial of the cause in any manner affecting the charge against the defendant."

—*District of Columbia* v. *Haildy*, 8 D. C. 446.

"To amend is to correct, rectify or to free from error * * *."

—252 Fed., 894.

III.

**The court erred in overruling the demurrer of the defendant to the testimony of the Government, and in overruling and refusing to sustain the motion of the defendant, at the close of the whole case and direct a verdict in favor of the defendant.**

In a conspiracy case it is a well known maxim of law that it is the duty of the court to instruct the jury that they should weigh with considerable care and scrutinize the evidence given by co-conspirators. *Arnold* v. *U. S.*, 94 Fed. 1499, syllabus 2, 10th C. C. A. This being true, the trial judge should, with equal care, weigh and scrutinize the evidence when he considers the demurrer thereto. If the indictment charged conspiracy to embezzle the rule of evidence that casts upon the defendant the burden of his good faith does not obtain.

All the testimony, save and except that given by Woodrow W. Croom, a conspirator, and O. W. Fullington, a co-conspirator, is simply that of putting the property which

Croom embezzled in the possession of the defendants, and has no other probative force or effect. To that end we shall now examine the testimony of these two co-conspirators to ascertain whether or not the testimony is sufficient as against the demurrer. We are confident that no fair and reasonable mind would believe anything that these two conspirators testified to. We shall, to bring out in bold relief, parallel the testimony of these two witnesses.

| WOODROW W. CROOM. | O. W. FULLINGTON |
|---|---|
| I asked Fullington if he would like to buy some butter. He said to see the boss. (Tr. 16) | The first occasion I had of meeting him he came in the store and asked if I needed some eggs. I told him to see the boss. He went and talked to Mr. Atyia (Tr. 21). (On cross examination): I don't remember ever having seen Atyia talking to the Sergeant (Tr. 24). |
| I asked Fullington if he would like to buy some butter (Tr. 16). | The first occasion * * * asked if I needed any eggs (Tr. 21). |
| Mr. Smith paid for it (Tr. 16). (On cross examination): I made the first trip about 9:00 o'clock in the morning and saw Fullington and Mr. Smith. Didn't see Atyia (Tr. 17). The next day I took twenty-four pounds of butter (Tr. 16). | Atyia paid him $10.00 (Tr. 21). The first time he brought a case of eggs containing thirty dozen (Tr. 21). |
| A few days later I took a case of eggs and delivered them to Fullington. Fulling- | Croom delivered eggs a day or two afterward. Atyia paid for them (Tr. 22). |

Woodrow W. Croom—Continued.

ton paid for the eggs with Mr. Smith's consent (Tr. 18).

(On cross examination with reference to the five cases of eggs): That was the first merchandise I delivered when Atyia was present (Tr. 19).

I didn't obliterate the markings. I said something to Mr. Fullington about it and he said he would take care of it (Tr. 17).

O. W. Fullington—Continued.

I marked out three of the markings on the cases. I don't know who marked the rest. I marked three of them with a brush. They said to rub the numbers off, Atyia, Smith and the Sergeant (Tr. 21).

(And on cross examination): The Sergeant and I never had any conversation about marking the things off the boxes. I testified that somebody said something about marking off the markings on the cases. The Sergeant marked three with a pencil. I painted three. Of the five cases that went to Muskogee, the Sergeant marked two of them and I marked three. Atyia, Smith and I agreed that the brands on the boxes should be marked off. Atyia, the Sergeant and myself marked them out. Mr. Smith was not

Woodrow W. Croom—Continued.

Every time I went into the store I contacted Fullington. I talked to Fullington at other times than in the store. I talked to Fullington before I went into the store (Tr. 20).

O. W. Fullington—Continued.

present and so far as I know, he didn't mark any of them (Tr. 23-24).

He (the Sergeant) did not come to me the first time he sold stuff in the store (Tr. 23).

Government's Exhibit 5, being a statement by Atyia (Tr. 27-28): "Fullington asked (Atyia) if we could use some eggs and directed the Sergeant to see me (Atyia) which he did and the Sergeant asked me if we could use some cases of eggs and butter. I told him I could use it; and a day or so later he brought me one or two cases of eggs, and I paid him either $10.25 or $10.50 per case. A few days later, he brought some more eggs, and I paid him the same per case. A few days later I purchased one case of Gold Seal butter. A few days later I purchased 25 pounds of Gold Seal butter." This testimony conclusively shows that these witnesses were not telling the truth about what happened, and they used the ordinary crutch which an untruthful witness uses when pressed on examination—that he did not remember.

This testimony, if it shows anything, shows that Croom and Fullington entered into a conspiracy to dispose of certain embezzled property belonging to the Government. It is clearly evident that Croom and Fullington had known each other prior to Croom's entry into the army; that Croom was seeking an outlet for this embezzled property and approached Fullington and made some sort of an arrangement

with Fullington for a disposal thereof. Fullington was granted immunity by the United States Attorney. (We say he was granted immunity for he was not indicted and prosecuted in this case, although he was the arch conspirator.)

Judge SANBORN, in *Sykes* v. *United States* (C. C. A. 8), 204 Fed. 909, says (913):

> "* * * and inspired by hope of immunity from punishment, which in this case has since turned to glad fruition."

And, at page 910, further says:

> "Mrs. Callahan, alone, who pleaded guilty to charges and was sentenced on May 30, 1912, to confinement in jail and three months to date of February 28, 1912, and to pay a fine of $100.00, so that she was in effect discharged after the verdict."

These same witnesses try to bring the defendant Smith into the conspiracy by insinuating that he was present in the store when some of the property was delivered. They also further try to insinuate that defendant Smith paid for part of the produce, and they further attempt to connect defendant Smith with the erasing and obliterating of some of the marks on said property. However, their evidence is so contradictory and at variance with each other that it is unworthy of belief.

In *Arnold* v. *United States, supra*, which cites with approval and quotes:

> "In *U. S.* v. *Hinz*, C. C., 35 F. 272, at the bottom of page 278, it is said: 'So also, "if two or more accomplices are produced as witnesses, they are deemed not to corroborate each other; but the same rule is applied,

and the same confirmation required, as if there were but one;" 1 Greenl. Ev., Sec. 381'."

At the bottom of page 509 the court says:

"The alleged offense resting practically upon the testimony of said accomplice, and considering the record as a whole, as herein set out in detail, the conclusion is reached that a new trial should be granted to appellant."

And, in the cited case, the court details the inconsistency of the accomplice's testimony also how it varies with the other testimony of the other accomplices, and with the other testimony in said case so as to render their testimony highly questionable. We have pointed out in this case the inconsistency and the varience of the testimony of these two accomplices so as to show that their testimony is unworthy of belief.

In *United States* v. *Murphy*, 253 Fed. 404 (D. C. New York):

"Where the only evidence on which a conviction could be sustained was the testimony of an accomplice, and he left the stand a thoroughly discredited witness, the case should not be submitted to the jury, even laying aside the fact that the prosecution relied on accomplice testimony."

And, in *Sykes* v. *United States, supra*, Judge SANBORN says:

"It is undobutedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them.

"Other evidence than that of an accomplice or perpetrator, identifying and connecting the accused

with the crime as one of the perpetrators or instigators thereof, is essential to constitute such a corroboration of the testimony of the accomplice or criminal as renders it safe or prudent to convict.

"The uncorroborated, contradictory, contradicted testimony of a confessed criminal, induced by hope of immunity, that the accused, who was not present when the crime was committed, was one of its perpetrators or instigators, does not constitute substantial evidence of that fact, which will sustain a conviction."

We respectfully submit that the testimony of the two conspirators, Croom and Fullington, was not corroborated by any reputable witness, and their testimony is so at variance with each other, and so contradictory as to render it unbelievable, and in view of the cited cases, we say that the demurrer to the evidence should have been sustained.

*b.* If this were a case of theft, then the testimony of the defendants as to their innocent connection therewith would be sufficient to overcome the presumption of theft by them of recently stolen property. Since this prosecution must be predicated upon fraud, any reasonable explanation by the defendants is sufficient to overcome any presumption against him. (*Grie* v. *United States*, 262 Fed. 407, C. C. A. 5.) Both Atyia and Smith testify that Smith had absolutely nothing to do with the purchase of any of the embezzled property, and they produce tickets for said property which show that it was purchased by and paid for by Atyia, said tickets being in the handwriting of the said Atyia. This evidence is not disputed, and not contradicted, and said tickets were introduced in evidence in court (Tr. 41).

It is true Mr. Smith was the manager of the store generally, but the produce department was under the full cus-

tody and control of Atyia. Smith had nothing whatsoever to do with the purchasing or paying for produce. The strongest evidence of good faith is that the produce was purchased at regular wholesale price, and was sold for prevailing retail price (selling at less than value competent evidence to go to the jury. *Boehm* v. *United States* 271 Fed. 454). The testimony further shows that there was no attempt on the part of the defendant or Atyia, to conceal these goods (hiding goods competent evidence to go to the jury. *Boehm* v. *United States, supra)* either at the time of their purchase or while the property remained in the store. The eggs were set out in the original crates (Tr. 25), in plain view of any person visiting said store. The butter and cheese were displayed in the meat case which had a glass window in it, so that any person coming into said store could see said produce in said refrigerator; that at no time did Atyia or the defendant seek to destroy the cartons or cases in which said produce was delivered. If said defendant and Atyia had entered into a conspiracy with said accomplices, they certainly would have sought to make a larger profit than the legitimate profit made by merchants. There would be no inducement on the part of the defendant, or Atyia, to enter into a criminal act unless the same would be profitable to them above the legitimate profits enjoyed by all merchants. This is more especially true since the defendant was only the manager of said store, and Atyia was simply a clerk, so that neither of said parties could share even in said legitimate profits. The whole case is so fantastic, for conceding that there was a conspiracy, the amount of produce purchased was so small, the profit so little that the entire profit gained thereby would be less than the sale of one suit of clothes. Certainly, the

defendant and Atyia would not take chances on going to the penitentiary for a few paltry dollars.

The testimony shows that Atyia was induced to purchase this produce on the statement that the Government had a surplus, and being a foreigner, only recently a citizen of this country, he believed that any officer of the United States would do no wrong, and that he, Atyia, could safely do business with said officer as a gentleman, and that any transaction had with said officer would be well within the law. We believe that this is a reasonable explanation of Atyia's activity. The testimony shows that many soldiers visited said store and the Sergeant being present and talking to Fullington or Atyia would not excite the suspicion of the defendant; and, in this connection, we would like to point out the remarks of Judge WILLIAMS in the *Arnold* case, *supra*, in which he says:

> "These criminals who were so smart and adept as to assemble in the lobby of said bank without exciting suspicion, had the same opportunity as to the Denver National Bank which was on the opposite side of the street, not only to know its officers by sight, but also to understand when each went to lunch, and it is not presuming too much to conclude that they knew where Arnold would be at such time and what his then apparent duties were in the bank."

And these accomplices knew the conditions in the store, when the defendant Smith was in bed, and where he was in the store, and the fact that many soldiers visited said store in their uniform, and even if Smith had paid for some of the merchandise, which is denied, he could innocently do so on the recommendation of his clerk, without having been in any way involved in said conspiracy. The facts are that

the defendant did not know Croom until after their arrest (Tr. 41). And in this connection, we call attention of the Court to *United States* v. *Murphy, supra,* wherein it is said:

> "Where the evidence as a whole produced by the prosecution is consistent with innocence, and does not lead irresistably beyond a reasonable doubt to a conclusion of guilt, a verdict should be directed for the defendant."

These conspirators evidently knew that they could not complete this criminal conspiracy by and through Smith, and it was necessary for them to consummate the same through the weaker, the more credulous, and the less informed Atyia, for Mr. Smith in his testimony says that on numerous occasions soldiers have tried to sell him (Tr. 43):

> "If Fullington had come to me with this deal, I believe I could have caught on. This camp bunch, I will say, try to sell me dry goods but I didn't buy it."

Since fraud must be established in this case, and since the evidence on the part of the defendant clearly shows that he, the defendant, had nothing whatsoever to do with said transaction; and Atyia showing his utmost good faith in dealing with this officer under the belief that the officer had a right to do what he was doing; and due to the further fact that no effort was made on the part of the defendant, or Atyia, to conceal said goods, or to destroy the cartons; and that this scheme was made and concealed from the defendant is further borne out by the testimony of Douglass (Tr. 29) wherein he testified (detailing a conversation with Fullington):

> "Come around against the wall. I don't want everybody to see you give me the money."

And further corroborated by the witness, Casberry (Tr. 32) wherein the witness says (speaking of buying eggs with Fullington):

> "Smith does not know anything about this. I don't want you to tell him. I am trying to make a little money on the side."

There is no evidence in this record to show that the defendant has any criminal record, and since he took the stand and testified it is fair to presume that if he had any criminal record, the Government would have shown same.

Judge BRATTON, at page 509, in the *Arnold* case, *supra*, quotes with approval Wigmore on Evidence, Vol. 2, Sec. 980, and the supporting cases, to-wit:

> " 'The general rule in the absence of a statute regulating the matter, when a defendant offers himself as a witness, is that it may be shown, either by the record or on cross examination, that he has suffered previous conviction of a felony or felonies. Either method is permissible.' "

If the defendant, in the trial of this case, has insufficiently or inartfully attempted to preserve his rights in this case, we respectfully call the Court's attention to *Sykes* v. *United States, supra*, wherein it is said:

> "In criminal cases, in which the life or personal liberty of the defendant is at stake, the courts of the United States, in the exercise of sound discretion, may notice such a grave error as the absence of substantial evidence to sustain the conviction, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error."

In view of the above testimony and the cases cited by us, we respectfully submit that the trial court should have directed the jury to return a verdict of not guilty.

IV.

**The court erred in overruling and refusing to sustain defendant's motion for new trial.**

We assigned this as error for the purpose of showing that we used every available means to make our position clear to the court.

***Conclusion.***

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly a writ of certiorari should be granted and the Court should review and reverse the decision of the Tenth Circuit Court of Appeals.

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